Che Nazeri bin Mat v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–105 OF 2005
SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA
12 NOVEMBER 2009

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in 2,015g of cannabis — Whether affirmative possession of drugs established — Whether large amount of drugs showed drugs not for accused's own consumption

The appellant was convicted in the High Court of trafficking in 2,015g of cannabis contrary to s 39B(1)(a) read with s 39B(2) of the Dangerous Drugs Act 1952 ('the Act') and sentenced to death. He appealed against the conviction and sentence. On appeal, the appellant contended that the judge had erred in concluding that the prosecution had successfully established a prima facie case; and that the judge had failed to consider the defence.

Held, dismissing the appeal:

(1) The trial judge had properly made his findings of facts. His reasoned views were backed by evidence, logic and reasonableness, having witnessed and heard every witness. The appellant was indeed in affirmative possession of the drugs. His presumed possession of the drugs was never an issue in the instant case (see para 25).

(2) The drugs could not be for the appellant's own consumption given its large amount. In any event, the appellant did not suggest that the drugs were for his own consumption. The appellant's conduct could not be said to be passive — he did have the drugs with him when riding his motorcycle and threw them away when he realised that the police were after him (see para 26).

(3) The appellant had failed to cast any doubt on the issue of possession and had failed to rebut the presumption of trafficking (see para 27).

[Bahasa Malaysia summary

Perayu telah disabitkan di Mahkamah Tinggi bagi kesalahan mengedar 2,015g kanabis yang bertentangan dengan s 39B(1)(a) dibaca bersama s 39B(2) Akta Dadah Berbahaya 1952 ('Akta') dan dihukum mati. Dia kemudian merayu terhadap sabitan dan hukuman. Di peringkat rayuan, perayu menghujah bahawa hakim bicara terkhilaf dalam memutuskan

A bahawa pihak pendakwaan telah berjaya mewujudkan suatu kes prima facie; dan bahawa hakim gagal untuk mempertimbangkan pembelaan.

Diputuskan, menolak rayuan:

B (1) Hakim bicara betul dalam keputusannya. Keputusannya disokong oleh keterangan, logik dan kemunasabahan setelah melihat dan mendengar setiap saksi. Adalah disahkan bahawa perayu memang mempunyai dadah dalam milikannya. Andaian pemilikan dadah bukan isu di dalam kes ini (lihat perenggan 25).

C (2) Dadah-dadah tersebut bukan untuk kegunaannya sendiri memandangkan ia dalam kuantiti yang besar. Apa jua pun, perayu tidak mencadangkan bahawa dadah-dadah tersebut adalah untuk kegunaannya sendiri. Tindakan perayu tidak boleh dikatakan sebagai pasif, dia mempunyai milikan dadah-dadah tersebut ketika D menunggang motosikal dan mencampaknya apabila dia sedar polis sedang mengejarnya (lihat perenggan 26).

(3) Perayu gagal mewujudkan apa-apa keraguan bagi isu milikan dan gagal mematahkan anggapan pengedaran (lihat perenggan 27).]

E **Notes**

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

F **Cases referred to**

Lee Chee Meng v PP [1992] 1 MLJ 322, SC (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
Pendakwa Raya lwn Haling Arala Jimjani [2008] 5 MLJ 331; [2008] 4 CLJ 163, CA (refd)
G *PP v Yuvaraj* [1969] 2 MLJ 89, PC (refd)

Legislation referred to

Criminal Procedure Code s 180
Dangerous Drugs Act 1952 ss 2, 37(d), 37(da), 39B(1)(a), (2)

H **Appeal from**: Criminal Trial No 45–13 of 2001 (High Court, Shah Alam)

Rusli Zain (Rusli Zain & Associates) for the appellant.
Ahmad bin Bache (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

I **Suriyadi JCA (delivering judgment of the court):**

[1] The appellant was charged at the High Court with the offence of

trafficking 2,015g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA 1952'), and if found guilty and on conviction shall be sentenced under s 39B(2) of the same Act.

[2] The charge reads as follows:

> Bahwa kamu pada 15 Ogos 2000, lebih kurang jam 6.20 petang, di tepi Jalan Persiaran Surian, Bandar Baru Sungai Buloh, di dalam daerah Petaling Jaya, di dalam Negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya iaitu 2,015 gram cannabis, dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B (1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B (2) Akta yang sama.

[3] The prosecution had called eight witnesses, and at the end of its case, the court found that the prosecution had established a prima facie case pursuant to s 180 of the Criminal Procedure Code, whereupon the defence was called. The appellant chose to give sworn evidence at the stage of the defence. Despite his testimony, at the end of his case, the court found that the prosecution had proven its case beyond reasonable doubt. The court thereupon found him guilty, convicted him and sentenced him to death. Being dissatisfied, he filed a notice of appeal hence the matter before us. We heard the appeal and at the end of it, dismissed the appeal and affirmed the finding of guilt, conviction and sentence of death by hanging.

THE FACTS OF THE CASE

[4] The arresting officer ie SP5, on 15 August 2000 had received information of an unidentified man about to traffic ganja at Simpang Tiga, Jalan Persiaran Surian, Pusat Bandar Sungai Buloh, Petaling Jaya. He would be riding a motorcycle bearing No KAX 6549. On receipt of that information, at about 5pm SP5 gathered a team and held a briefing. He split the team into three groups. The first group was to be led by DSP Bakhtiar, who was given the task of observing and thereafter to immediately pass over any relevant information to the arresting team ie the second group. The latter would be led by SP5 himself. The third group would comprise Kpl Rajendran Singh and one Det/Sjn Adzman, whose main activity was to patrol around with motorcycles, and to spot the said KAX 6549.

[5] At the conclusion of the briefing, all three groups took their respective observation posts at the said Simpang Tiga Jalan Persiaran Surian, Pusat Bandar Sungai Buloh. They communicated with each other by walkie-talkie. The first and second groups took up position in two separate cars. At about

A 6.20pm SP5 received a signal from Det/Sjn Adzman of the first team that a motorcycle bearing the No KAX 6549 was on its way towards Simpang Tiga, facing the position held by SP5.

B **[6]** At the time when that motorcyclist was about to negotiate a U-turn, SP5 directed his driver to encroach and drive very closely towards the suspect. SP5 and his team alighted from his car and dashed towards the motorcyclist whilst simultaneously shouting 'Polis. Jangan lari'. While dashing forward, SP5 saw the male motorcyclist throwing with his left hand, a bag (P9), from the vehicle's basket. That bag fell about 3 feet away from the impugned C motorcycle. SP5 introduced himself as a policeman and then arrested the suspect ie the current appellant.

[7] SP5 then directed Det/Kons Ravintheran (SP6) to retrieve the bag, and D after checking the contents, found two slabs of dried leaves wrapped in transparent plastic, suspected of being cannabis. He showed the contents to the appellant. SP5 did not falter in identifying the male suspect as the appellant in court. The prosecution also called SP4, a JPJ officer who confirmed that the motorcycle owner was the appellant.

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[8] In the course of the appeal, counsel was determined to adduce certain evidence, even though the court had advised that it could prejudice the appellant's position. This advice was to ensure that the appellant's case was not damaged unwittingly (*Criminal Trial Advocacy for the Defence* by Hisyam F Abdullah @ Teh Poh Teik). Despite our well-intended advice he persevered and ventilated that SP5 subsequently brought the appellant to house No 4, Jalan Nuri 7/10, Pusat Bandar Sungai Buloh, at which place the police recovered another 13 slabs of suspected drugs. This was the appellant's house though the drugs were found in a room tenanted by another person called G 'Hisham'.

[9] The reason for the appellant's willingness to adduce these 13 slabs became clearer as the hearing went on. The appellant's counsel had submitted that there was every possibility that the drugs allegedly seized from him were H unwittingly mingled with the 13 slabs seized from 'Hisham'. Even on this issue the learned judge had meticulously examined the evidence especially that of SP5, SP8, SP7, SP2 and SP3. SP8 (the investigating officer) had confirmed that he took custody of the appellant and the seized bag which contained the two slabs of drugs. He kept the bag and the two slabs in his I metal cabinet for safe keeping. The next day he weighed them and found it to be about 2,060g. On 17 August 2000 he took out the bag together with the two slabs, and handed them over to SP7, for purposes of checking for fingerprints. The next day SP8 received them back and they were again kept in his cabinet for safe keeping until taken out for purposes of a media

conference. During that session the items were under his constant supervision. After the media session he retrieved the bag together with the two slabs, and put them in a package, and forthwith marked it with a letter 'M' sealed this time with the seal of 'PDRM'. The police report and the investigation paper numbers were also recorded on the 'M' package. On that same day that package was handed over to SP2, who was the chemist. The latter confirmed receiving that package which had 'M' marked on it. In it he found a bag and two slabs of drugs marked A1 and A2. He confirmed that these two slabs were cannabis as defined under s 2 of the DDA 1952 and weighed 2,015g. He affirmed that he returned that 'M' package to SP5 after sealing the package with his Chemist Department seal. This seal was still intact when shown to him in court. In fact the learned judge likewise confirmed that the seal was still intact when scrutinising it. SP5 confirmed that on receipt of the 'M' package from SP2 he subsequently handed it to SP8, who then handed it to SP3 for safe keeping at the exhibit store.

[10] It was obvious that there was overwhelming evidence that the two slabs of cannabis, the very basis of the charge against the appellant, were never mixed with the 13 slabs recovered from 'Hisham's' room. Learned counsel later volunteered the information that he had no idea whether anyone was charged as regards the 13 slabs of drug, items which had no nexus to this appeal.

[11] Returning to the mainstream of the facts, the appellant was brought to Balai Polis Petaling Jaya after his arrest and thereafter handed over to the eventual investigation officer ie SP8. SP5 prepared the search list and also filed the police report, P30 and P31 respectively. The two slabs of cannabis were later sent to the Chemistry Department and as said above were analysed by SP2.

[12] Based on the evidence of SP5 and SP6 the learned judge was satisfied that the bag together with the contents were at all material time in the custody, control, and exclusive possession of the appellant. The inference was clear that the appellant was aware of the dangerous drugs, especially from his reaction, conduct and spontaneous actions when throwing away the bag from the basket of the motorcycle on hearing the shout, 'Polis. Jangan lari'. The only inference that could be gauged from his conduct was that he knew the bag contained drugs.

[13] The learned judge too was satisfied that the prosecution had established the impugned drugs as cannabis as testified by SP2. He too tracked and discussed the movement of the drugs and concluded that no break in the chain of evidence had been established. He was satisfied that the prosecution had not depended on the presumptive provision under s 37(d) of

A the DDA 1952 to establish custody, control and possession but rather on direct evidence. This provision reads as follows:

> 37 Presumptions
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> B In all proceedings under this Act or any regulation made there under —
>
> (a) ...
>
> (b) ...
>
> (c) ...
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> C (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

D

[14] He further opined that as the prosecution had relied on direct evidence to establish possession, the issue of 'double presumption' did not exist in this appeal. With direct evidence being in abundance in order to establish possession with knowledge, the presumption of s 37(da) of the E DDA 1952 thus was applicable for purposes of establishing trafficking. This provision reads:

> 37 Presumptions
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> F In all proceedings under this Act or any regulation made there under —
>
> (da) any person who is found in possession of —
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> (vi) 200 grammes or more in weight of cannabis;
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> G ...
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

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[15] He thus accepted the allusion to the latter provision to establish the ingredient of trafficking.

[16] With such a straight forward case, it was no surprise that the learned I judge found that a prima facie case had been established by the prosecution hence calling the defence. Having perused the evidence together with the grounds of judgment we failed to detect any error committed by the learned judge when calling the defence. The evidence was overwhelming hence the decision that a prima facie case had been established by the prosecution. The

effect of it is that had the appellant elected to remain silent he would immediately have been found guilty, convicted and sentenced to death by the learned judge.

[17] The three alternatives were explained, and after agreeing to give sworn statements, the defences outlined were as follows, namely that:

(a) he went to the vicinity where he was arrested as he had been contacted by 'Hisham' who relayed that his van had broken down. On the pretext of wanting to assess the condition of the van first, he rode off to the spot with his motorcycle but without any repair tools brought along by him. There he saw 'Hisham' on his handphone, talking. He was with another male person outside the van;

(b) he then stopped next to the left side of the Nissan Vanette van. At the very moment when he wanted to alight from his motorcycle two cars suddenly stopped at the rear and side of the van. He was arrested and handcuffed whilst 'Hisham' and his friend were guarded by the police;

(c) he was ordered to enter a car and in the course of it saw 'Hisham' and his friend entering the van and driving off without being followed by any police personnel; and

(d) contended that the drugs were not his and never in his possession when seized. He canvassed that it was found by SP6 in 'Hisham's' van, on the left side of the front passenger seat. The appellant thus alleged that the respondent had failed to establish that he had custody, control and possession of the seized drugs.

[18] The court held the view that the appellant's version was unusual, strange and illogical. There was no reasonable and logical reason why the appellant was arrested and charged if the bag containing the drugs were indeed retrieved from 'Hisham' van. It was unreasonable and illogical that after arresting 'Hisham' and his friend, they would be allowed to depart from the scene, and thereafter searching for 'Hisham' again at the appellant's house.

[19] In the event the defence of the appellant was to be believed, in that he went to the scene where he was arrested, on account of 'Hisham's' call that his van had broken down, two questions were posed by the learned judge viz:

(a) why did the appellant not bring along his repair tools; and

(b) if the vehicle had broken down how could 'Hisham' have driven the van away?

[20] Further from the evidence adduced, inter alia, the learned judge viewed that it was improbable that he had been roughened up as there was

A no reason to do so. The relevancy of this issue relates to his denial of the bag (P19), an item which was included in the search list, and of which he had initialed. In fact there was evidence adduced that when he was taken to his home, in the course of the investigation he was allowed to wait at the lounge, thus dispelling any notion that the police had been rather harsh on him.

B

[21] At the end of the case, upon considering all the evidence before him, the learned judge held that the appellant failed to raise any reasonable doubt on the prosecution's evidence of affirmative possession on the part of the appellant, and that the appellant also failed to rebut the presumption of
C trafficking on the balance of probability. Thus, the prosecution had established its case beyond reasonable doubt (*Lee Chee Meng v Public Prosecutor* [1992] 1 MLJ 322, *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89).

D **[22]** Being dissatisfied with the decision of the learned judge, the appellant filed the notice of appeal. His main grounds were that the learned judge had erred when concluding, be it from the aspect of fact or law, that the prosecution had successfully established a prima facie case, and that the learned judge had failed to consider the defence when he rejected the defence,
E without adhering to the demands of law. Even though these grounds in the memorandum of appeal were phrased in such general terms they were comprehensive enough to cover a wide area. Come the hearing of the appeal before us, learned counsel merely took the same beaten path at the prosecution's stage or supplying the same defence that he had canvassed at the
F High Court. No novel or new legal approach was suggested to us, thus leaving us with no choice but to sift the evidence again, and at the same time concluding whether the learned judge had committed any fundamental error when enroute to convicting the appellant.

G **[23]** Our finding of facts is as follows. A perusal of DW1's evidence reaffirmed that at about 5.30pm to 6pm he received a call from his friend named Hisham requesting him to go to Sg Tiga, Jalan Persiaran Surian, Sungai Buloh as his van had broken down. He testified much of the evidence as adduced above. He saw Hisham with a friend near a van across the road,
H and negotiated a U-turn, as he wanted to approach him. On reaching Hisham he took out his helmet, and when he was about to alight, two vehicles suddenly appeared. People came dashing out and without identifying themselves had handcuffed and roughed him up. They inspected his motorcycle but found nothing. He then saw an Indian man going towards
I the van and from the left passenger seat next to the driver recovered a bag. That Indian man brought the bag and showed the contents to him. At that time Hisham and his friend were standing near the left side of the van and were merely observed by the police. He was then taken away in a car. Hisham and his friend later left in the van. Thereafter he took the police to his house.

The door was opened by a person called Farouk. He later saw Farouk and his Indonesian girlfriend being handcuffed (in court the prosecution explained that they failed to execute the warrant of arrest on Farouk hence his non-attendance in court). From the latter's room was found the other unconnected drugs.

[24] From the above evidence it was obvious that the defence of the appellant was that those two slabs of drugs were not his but taken from Hisham's van. With the appellant canvassing that the bag containing the drugs was seized from the van, rather than having been retrieved from the ground, witnessed to have been thrown away by him, the learned judge thus had a choice of believing his singular and uncorroborated testimony or the evidence of the police. We were aware that the learned judge was in a vantage position and had audio-visual advantages; he witnessed the demeanor of all the witnesses be they the prosecution or the appellant himself, and was way ahead of this panel when having to conclude on the issue of credibility. He had crossed referred the evidence of the witnesses with the other neutral evidence and eventually wrote:

> Saya mendapati bahawa versi tertuduh ini adalah terlalu janggal, aneh dan tidak munasabah. Tidak ada sebarang sebab yang munasabah dan logikal kenapa tertuduh ditangkap dan dituduh di dalam kes ini jika sekiranya polis menjumpai beg yang mengandungi dadah tersebut di dalam van Hisham. Jika benar, orang yang sepatutnya dituduh adalah Hisham dan bukan tertuduh. Adalah lebih tidak munasabah dan tidak logikal, selepas menjumpai dadah tersebut dan menangkap Hisham dan kawannya, polis kemudian membiarkan sahaja Hisham dan kawannya masuk ke dalam van dan meninggalkan tempat itu.
>
> Pada masa tertuduh ditahan, terdapat beberapa orang anggota polis di tempat itu. Anggota-anggota polis yang terlibat pada hari kejadian adalah seramai 10 orang. Mereka mempunyai cukup anggota untuk menangkap dan memastikan Hisham dan kawannya tidak dapat lari daripada tahanan. Mengatakan mereka meninggalkan tempat itu dengan van di hadapan mata polis, adalah tidak masuk akal, sedangkan itulah tujuan polis pada hari tersebut, iaitu untuk menunggu sama ada ada orang akan datang mengedar dadah berdasarkan kepada maklumat terdahulu yang diterima oleh polis. Adalah tidak munasabah polis pergi pula ke rumah tertuduh untuk mencari Hisham selepas menangkapnya di tempat kejadian dan kemudian membiarkannya melarikan diri.
>
> Alasan tertuduh ia pergi ke tempat kejadian setelah mendapat panggilan daripada Hisham bahawa vannya rosak adalah tidak munasabah langsung memandangkan jika cerita tertuduh benar atau mungkin benar, bagaimana Hisham pula boleh memandu van yang dikatakan rosak tanpa dibaiki. Sebagai seorang mekanik, yang baru sahaja balik daripada kerja, tindakan yang wajar dan munasabah ialah membawa alat untuk membaiki kereta apabila diberitahu oleh Hisham bahawa vannya rosak. Jika alat-alat membaiki kereta tidak ada di rumahnya, tindakan yang logikal ialah pergi semula ke bengkel sebelum pergi menemui Hisham yang sedang menunggu kerana vannya rosak.

[25] By no account could this panel have done better than the above analysis by the learned judge on the issue of finding of facts. The reasoned views were backed by evidence, logic and reasonableness, what with him having witnessed and heard every witness. Having prognosed the evidence, we likewise were satisfied that the bag containing the drugs were never recovered from the van, but retrieved from the road by the police. We accepted the prosecution's evidence that the bag had been flung away by the appellant when the police dashed forward towards him. There was no reason for him to throw the bag away or maintain a distance from it unless he knew the contents were dangerous drugs. We concluded that he indeed was in affirmative possession of the drugs. The factor of him presumed to have been in possession of the drugs was never an issue here.

[26] We considered whether it was for his consumption, and the answer was in the negative, as the amount was rather large. Needless to say he never even suggested that it was for his own consumption. Even though the appellant never ventilated that his possession was 'passive possession' (bearing in mind that suggestion was never his defence), and if established could rebut the presumption of trafficking, we still considered that open defence (*Pendakwa Raya lwn Haling Arala Jimjani* [2008] 5 MLJ 331; [2008] 4 CLJ 163; *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64). We were satisfied that he had the drugs with him when riding his vehicle, and when realising that the police were on his tracks, threw them away. His conduct could never be said to be passive. In this whole episode, even though he had been caught red-handed with the drugs, he refused to dislodge himself from the affirmative possession, or attempt to rebut the presumption of trafficking. He instead held on steadfastly, much to his detriment, the preferred defence of passing ownership and possession of the drugs on Hisham, and blaming the police of twisting the facts.

[27] Having perused the evidence in its entirety, we agreed with the finding of the learned judge, who had carried out a maximum evaluation exercise, that the appellant had failed to cast any doubt on the issue of possession and had failed to rebut the presumption of trafficking. Based on all the above reasons we dismissed the appeal. We did not hesitate to affirm the finding of guilt, conviction and sentence of death meted down on the appellant.

Appeal dismissed.

Reported by Andrew Christopher Simon